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In The

Supreme Court of the United States

October Term, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

vs.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Plaintiff-Appellee.

On Appeal from the Supreme Court of the State of Delaware

APPELLEE'S ANSWERING BRIEF

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QUESTION PRESENTED

Does the use of the Delaware sequestration statute, invoked solely to obtain jurisdiction in this derivative action over non-resident present and former officers, directors and/or employees in a Delaware corporation, in order to adjudicate claims against them for misconduct related to the affairs of the issuing corporation, which authorizes attachment of the appellants' stock without notice or a prior hearing, but which provides adequate safeguards and for release of such stock upon appellants' general appearance, comport with the due process requirements of the Fourteenth Amendment?

SUMMARY OF ARGUMENT

The Delaware sequestration process was used here to seize the appellants' stock prior to notice or hearing. This procedure is entirely consistent with due process of law because obtaining jurisdiction over non-resident officers, directors and key employees in this derivative action qualifies as an "extraordinary situation" and is attended with sufficient safeguards to prevent abuse.

Furthermore, the overall circumstances of the case, including the nature of the appellants' ties with Delaware, Delaware's own interest in adjudicating the claims, the public policy favoring Delaware as the forum to resolve the dispute, and the relative hardship on the parties, makes the exercise of jurisdiction by Delaware fair and just and consistent with fundamental notions of fair play.

ARGUMENT

I.

THE SEQUESTRATION IN THIS CASE DOES NOT OFFEND DUE PROCESS FOR LACK OF PRIOR NOTICE.

Appellee, on behalf of Greyhound, a Delaware corporation, initiated the sequestration process in this case by filing a verified complaint, an affidavit pursuant to Chancery Rule 4(db) and a sequestration bond. Thereupon, the Greyhound stock of the non-resident appellants was seized without prior notice or hearing. The sole purpose of this seizure was to obtain jurisdiction to provide a forum in which appellee's charges could be adjudicated. Appellants' property would have been immediately released if they had made a general appearance.[1]

1. As soon as appellants appear, they may immediately petition the court for a release of their property, which will automatically be granted absent a showing by appellee of a special reason for continuation of the sequestration order.

The seizure in this case must, therefore, be distinguished at the outset as factually different from those examined in several recent decisions of this Court, to wit, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In each of these cases, *in personam* jurisdiction over the defendant was present and the Court was empowered to adjudicate the claim and render a judgment. The attachments were, therefore, not the exclusive vehicle for obtaining relief but merely served as security to satisfy any judgment rendered.[2]

The fundamental principles enunciated in these recent decisions considering pre-hearing seizures in the debtor-creditor context, although applicable here, must be viewed against the factual differences involved in this jurisdictional context. See, *e.g., Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123, 1127 (3rd Cir. 1976). They do make clear that in certain circumstances, procedures which sanction the attachment of property without prior notice or hearing can meet the due process test. Such circumstances are those in which

> "the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes v. Shevin, supra*, 407 U.S. at 91.

The facts of this case substantially comply with these standards and therefore the decision below holding that appellants were not denied due process should be affirmed.

2. See Mr. Justice Powell's concurring opinion in *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 610 (1975).

A. Obtaining Jurisdiction in a Derivative Action Over Non-resident Directors, Officers and/or Employees in a Delaware Corporation to Adjudicate Claims for Official Conduct, is an "Extraordinary" Situation.

In *Fuentes v. Shevin, supra* at 91 n. 23, this Court recently noted that the situation in *Ownbey v. Morgan,* 256 U.S. 94 (1921), a case involving the more onerous[3] predecessor to Delaware's sequestration process, was an example of an "extraordinary situation" which justified excusing notice prior to seizure:

> "The attachment [in Ownbey was] necessary to secure jurisdiction in state court — clearly a most basic and important public interest."[4]

The purpose of the statute in *Ownbey,* as with 10 Del. C. §366, was "the conversion of a proceeding *quasi in rem* into an action *in personam.*" *Ownbey* at 111. Appellants are attempting to overturn the decision below by forging an attack on *Ownbey,* although that case tested procedures extending well beyond those presented here. The current viability of *Ownbey* vis-a-vis some of the procedures involved in that case may be in doubt. However, its fundamental thrust — namely, a state's vital interest in securing jurisdiction over non-resident debtors — is very much alive. The motivation underlying *Ownbey* is therefore not at all inconsistent with the most current pronouncements of this Court which have cited *Ownbey* with approval. *Fuentes,*

3. Under that statute, subsequent to the *ex parte* seizure, the defendant was required to post bail in order to make a personal appearance.

4. The appellants have achieved no headway by asserting that reliance by the court below on this *Fuentes* footnote was misplaced because the accompanying text was ignored (Appellants' Brief, p. 11). When both the text and the footnote are read together, it is clear that in setting forth, in the text, the three conditions which must coexist for a valid seizure without notice, the Court was not inventing criteria in the abstract. Rather, the Court was depicting the conditions which were present in *Ownbey* as well as in each of the other few limited situations [where the] Court allowed such seizures. *Fuentes, supra,* 407 U.S. at 91.

supra at 91 n. 23; *Sniadach, supra* at 339. See also *Calero-Toledo v. Pearson Yacht Leasing Corp.,* 416 U.S. 663, 679, n. 13 (1974). Accordingly, no further review of *Ownbey* is called for by the facts of this case.

In view of the important governmental and public interest which exists in bringing non-resident defendants within the court's jurisdiction, the use of the Delaware statute as applied in this case qualifies as an "extraordinary situation." Moreover, the need for prompt action is inherent in the nature of the remedy itself. If notice were given prior to seizure, the appellants could transfer the property and defeat jurisdiction, *Gordon v. Michel,* 297 A.2d 420, 423 (Del. Ch. 1972).

The Delaware statute as applied in this case serves the most important additional function of resolving litigation concerning Delaware corporate law — in this case for the benefit of a Delaware corporation[5] — in the Delaware courts, which are in a "unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief." *Gordon v. Michel, supra,* 297 A.2d at 423. This case must be distinguished, therefore, from attachments which provide for "the routine acquisition of jurisdiction over non-resident defendants in purely private disputes" (Appellants' Brief, p. 13). While it has been argued that such "routine" acquisition of jurisdiction could not be what this Court contemplated as an "extraordinary situation" acquisition of jurisdiction in a derivative case should fall within that scope.[6]

5. While appellee here is an individual stockholder, he sues "for all others similarly situated" and in the right of and for the benefit of Greyhound, a Delaware corporation. This case must, therefore, be distinguished from *Fuentes,* where "no more than [a] private gain was at stake." *Cf., Fuentes v. Shevin, supra.*

6. Even commentators who have seriously questioned whether foreign attachment statutes in general meet the "extraordinary situation" test have indicated that derivative actions may be an exception. See, *e.g., Quasi in Rem Jurisdiction & Due Process Requirements,* 82 Yale L.J. 1023 (1973).

The utilization of this well-known procedure, which has been in existence for many years,[7] certainly promotes the accountability of corporate fiduciaries and thereby serves a vital state and national[8] purpose. Appellants must acknowledge that Delaware has a compelling and legitimate interest in resolving a dispute for the benefit of a nationally known corporation incorporated in its own state and actively doing business in Delaware. As recently stated in *Gordon v. Michel, supra* at 422:

> "There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware Law."

Directors and officers of Delaware corporations who reside throughout the nation are, via 10 Del. C. §366, readily brought into a single forum in order to resolve disputes relating to their corporate duties. Were the sequestration process under 10 Del. C. §366 unavailable, the appellee would, in reality, be denied a reasonable vehicle of bringing its case to court. Such a result would be unfortunate in that it would only facilitate an easy escape route for corporate directors, officers and other key personnel from the rigors of corporate responsiblity, the precise charge which is being levied in this action.

7. See the opinion of the court below at A98. While custom alone is insufficient to establish that a procedure conforms with due process, it still is a factor to be considered. The Court in *Fuentes, supra*, distinguished the new statutory type of replevin being challenged from its antecedents, thus implying that the absence of such distinctions would have been a point in favor of the validity of the procedure. While the point would not be as crucial as in *Ownbey, supra*, it is not to be altogether overlooked.

8. Over one-half of the important United States corporations are incorporated in Delaware; 50% of those on the New York Stock Exchange are incorporated in Delaware; and 35% of those on the American Stock Exchange are incorporated in Delaware. National Division of the Wilmington Trust Co., "Why Delaware" (1973-74). Because such a large percentage of the corporations incorporated in the United States are incorporated in Delaware, the effectiveness of Delaware's corporate laws takes on an importance national in scope.

B. Sufficient Safeguards Are Present.

Unlike the statutes invalidated in *Fuentes v. Shevin* and *North Georgia Finishing, Inc. v. Di-Chem, supra,* where a clerk issued the orders of seizures, 10 Del. C. §366 provided significant pre-seizure and post-seizure safeguards to appellants to protect against abuse. Firstly, the writ was issued by the court.[9] Before the judge for consideration was a verified complaint, and an affidavit submitted by the appellee which contained a recitation of the claim against appellants, the fact of appellants' non-residence, the details concerning appellants' ownership of property in Delaware and the value of that property, and the source of such information. This information supplied the court with sufficient facts on which to determine whether initiation of the seizure complied with the statutory tests, and hardly left the state "in the dark," See *Fuentes, supra* at 93. As stated by Vice Chancellor Brown, at A84,

> "The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the non-resident defendant in an effort to get the merits of his case before the court."

The safeguards available did not end there and are detailed in the opinion of the court below at A109-111. There it is pointed out:

> "the sequestration procedure is at *all times* under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally;

9. The importance of this element was underscored by the Third Circuit in *Jonnet, supra.*

> if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim."

Appellants contend, however, that the foregoing pre-seizure controls are illusory in that the Delaware Chancery Court was required to issue the writ as a matter of right regardless of the merits of the appellee's claim (Appellants' Brief, p. 7). Appellants further contend that even if such controls are adequate, an immediate post-seizure hearing is nevertheless required. Appellee respectfully disagrees.

In re-examining, *after* its decision in *Fuentes v. Shevin*, a statute where no notice prior to seizure was provided, this Court resisted any approach which would impose inflexible requirements upon the state, stating:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell v. W.T. Grant Inc., supra*, 416 U.S. 600, 610.

The court below, therefore, properly found it unnecessary to "litmus test" the Delaware sequestration procedure against "every facet" of the foreign attachment cases which have been decided. Rather, the relevant inquiry should be and was whether in this case adequate safeguards attended the procedure considering the respective interests of the parties.

The instant case is distinguishable from cases such as *North Georgia Finishing, Inc. v. Di-Chem, supra*, where the Court found that procedures were required to confirm the existence of

special facts justifying the attachment.[10] Here, no such "special" facts exist because the sole relevant facts are appellants' non-residence and ownership of property in Delaware. Pre-seizure procedures to confirm any such facts are meaningless.[11]

Similarly the requirement of an immediate post-seizure hearing is altogether inapplicable where sequestration was invoked solely to accomplish the valid governmental purpose of obtaining jurisdiction over the non-resident appellants. The Court has, in the cases referred to by appellants, hand-tailored the requirement of an immediate post-seizure hearing to prevent an "initial error," *North Georgia Finishing Inc. v. Di-Chem, supra* at 608, in prematurely depriving a debtor (who is already within the court's jurisdiction) of its property during the pendency of an action. This initial error could result, for example, from a weak claim by a creditor that his debtor is about to consume the property[12] or that the debtor is about to abscond or otherwise frustrate the creditor's ultimate judgment.[13]

When attachment is continued throughout the pendency of an action, the normal litigating posture of the parties, which dictates that a plaintiff cannot obtain ultimate relief until a judgment is obtained in its favor, is reversed. Therefore, if a plaintiff wishes to get such relief before the judgment, it is

10. The seizure here works far less hardship on the appellants. The seizure does not transfer the appellants' property to the appellee, but rather immobilizes the property until they appear when it will be released.

11. The Court has indicated, in *Fuentes, supra*, that any requirement that the plaintiff must put forth *ex parte* evidence in addition to the allegations in the complaint would provide only "illusory" protection to a defendant in that such evidence would not be subject to dispute by the defendant.

12. Where plaintiff's allegations of fraud are merely on information and belief, *e. g.*, see, *Sugar v. Curtis*, 383 F. Supp. 643 (S.D.N.Y. 1974).

13. Indeed, in *North Georgia Finishing Inc. v. Di-Chem, supra*, Justice Powell indicates in his concurring opinion, at 610, n.1, that the majority in that case (and perhaps in all related cases) was not directing its attention to sequestration which is designed to serve a jurisdictional function and thus, was not passing on the required controls in such a case.

understandable that it be required to come into court right after the seizure to demonstrate a credible basis for such an unusual taking. However, in the case at bar, appellee does not wish to continue to deprive appellants of their property.[14] On the contrary, as soon as they appear, their property will be released. Accordingly, while a post-seizure hearing might be required in order to afford a defendant an opportunity to obtain a release of his property prior to a resolution of the underlying controversy, it is not required where the release is obtainable merely through an appearance.

Again, the sole reason for implementation of Delaware's sequestration statute here is to obtain jurisdiction over non-resident defendants and therefore, its usage "is not dependent upon the merits of the complaint as was true in *Fuentes, supra,* and *Mitchell, supra* (Opinion of Vice Chancellor Brown, A31). The only possible "initial error," therefore, is that plaintiff is incorrect in asserting that appellants are non-residents and that they own property within the state. But, as stated by Vice Chancellor Brown in the opinion below:

> "This determination is not left to the plaintiff. On the contrary, Rule 4(db) of this Court augments §366 by providing that '[no] order shall be entered under *10 Del. C.* §366 unless the non-residency of the defendant appears in the complaint and unless the complaint is accompanied by the affidavit of the plaintiff' or other credible person' showing each defendant's last known address and also describing the property sought to be sequestered, giving its estimated value, identifying the nature of the defendant's title or interest, and disclosing the source of the affiants information — Thus both

14. Even while the property is subject to seizure, the appellants may substitute other property.

> our Court rule and practice do provide for advance judicial review to determine that there is a factual basis for the service of process in this manner."

II.

APPELLANTS HAVE SUFFICIENT TIES WITH DELAWARE TO MAKE THE EXERCISE OF JURISDICTION FAIR.

This is a stockholders' derivative action brought against some twenty-eight individual defendants (appellants), most of whom are present or former directors, officers or key employees of The Greyhound Corporation.[15] Appellee seeks to recover damages occasioned by appellants' willful violation of an order of the United States District Court for the District of Illinois resulting in the imposition of sanctions for criminal and civil contempt of court and the levy of $600,000 in fines upon the corporation as well as conduct by appellants which caused Greyhound to be found in violation of the antitrust laws. Appellee further attacks the distribution of benefits improperly received by the appellants under Greyhound's deferred compensation and stock option plans.

Appellants maintain that any attempt to acquire jurisdiction over them as non-residents brings into play the due process limitations mandated by *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and *Hanson v. Denckla,* 357 U.S. 235 (1957) and that these decisions define limitations on judicial power even when the state purports to act upon property rather than persons.

15. All but five of the appellants are present or former directors, officers and/or employees of the Greyhound Corporation, a Delaware corporation. The remaining appellants are officers of Greyhound Lines, Inc. (subsidiary) or operating divisions of the Greyhound Corporation.

The court below addressed this precise question and rejected the appellants' contention that such limitations be read into 10 Del. C. §366. The court stated:

> ". . . that jurisdiction under §366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del. C. §163 [footnote omitted] the 'situs of the ownership of the capital stock of all corporations existing under the laws of this state — [is] in this state,' and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York,* 288 U.S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Copper Min. Co.,* 177 U.S. 1, 20 S. Ct. 559 (1900), it has done so and the presence hereof provides the foundation for §366 in this case. cf. *Breech v. Hughes Tool Company, supra.*"

Quite aside from the question of whether such limitations are applicable to a case involving a levy on property within the state[16] the relationship of these appellants with the State of Delaware brings them well within those limitations. While the Delaware statute as written may be applied to other situations where no such ties exist, appellants, who do have a sufficient relationship, lack standing to contest constitutionally on those grounds. *United States v. Raines,* 362 U.S. 17 (1960),[17] *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

16. As noted by Circuit Judge Gibbons in his concurring opinion in *Jonnett v. Dollar Savings Bank of City of New York,* 530 2d 1123, 1136 (3d Cir. 1976) it can be argued that due process due a litigant defending title to property will vary from that due other litigants.

17. There, the Court stated ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

In *Jonnett v. Dollar Savings Bank of City of New York,* 530 F.2d 1123 (3d Cir. 1976), Judge Gibbons, in his concurring opinion, had occasion to re-examine the scope of *International Shoe v. Washington, supra,* in light of foreign attachment. He there noted that *International Shoe* posited twin limitations upon the scope of state judicial power:

(1) "A State must have some palpable interest — rationally connected with public policy — in adjudicating a dispute within its borders for jurisdiction to be lawfully acquired."

(2) The parties and burdens associated with litigating in a particular forum should not result in a fundamentally unfair exercise of judicial power.

Contrary to the seizure involved pursuant to the Pennsylvania foreign attachment procedures in *Jonnett, supra,* the exercise of jurisdiction in the case at bar satisfies these two limitations.

A. Delaware's Interest In The Subject Proceedings.

The Greyhound Corporation is a creature of the State of Delaware. Its purposes are sanctioned by that state. It derives its powers from the laws of Delaware. The appellants' authority and powers are regulated and defined by its laws. As has been discussed in detail at pages 5-6 of this brief, Delaware has a vital state interest in calling into account the officers, directors and key employees of a corporation incorporated in Delaware for breach of the duties imposed by its law. No more logical forum exists for resolution of the issues posed by this lawsuit. The strong policy reasons in favor of centering corporate derivative litigation in the home state have in fact, been acknowledged by this Court. *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501 (1946).

Indeed other states, in recognition of the strong state interest in resolving derivative litigation at home, have recently enacted statutes subjecting non-resident directors to suit in the

state of incorporation. See, *e.g.*, Conn. Gen. Stat. Ann. §33-322 (Supp. 1971); S.C. Code §12-13.7 (Supp. 1970). The validity of these statutes has been upheld. *Weil v. Beresth*, 26 Conn. Sup. 428, 225 A.2d 826 (Super. Ct. 1966); *Wagenberg v. Charleston Wood Prods.*, 122 F. Supp. 745 (E.D. S.C. 1954). That Delaware has chosen 10 Del. C. §366, rather than the enactment of a "long arm" statute,[18] to bring appellants before the court is wholly within its province. Any other result would elevate form over substance, which this Court has recently refused to do:

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Counsel v. Millis*, 325 U.S. 697, 710 (1945), due process of law guarantees 'no particular form of procedure; it protects substantial rights. *NLRB v. Mackay Co.*, 304 U.S. 333, 351 (1938).'" *Mitchell v. W.T. Grant Inc., supra*, 416 U.S. 600, 610.

B. Ties of Appellants

Appellants here, all present or former officers, directors and/or key employees in a Delaware corporation, have a direct and substantial nexus with the State of Delaware. As with Greyhound Corporation, these appellants enjoyed and continue to enjoy benefits, powers and authority which they derive exclusively from the sovereignty of the State of Delaware. The strong and continuing nature of this tie is sufficient to satisfy the due process standards enunciated in *International Shoe, supra,* for the test of the required contact is qualitative, not

18. Appellants contend that even if they had the requisite contacts with Delaware, they would still be immune from jurisdiction because they were not served personally. Delaware's sequestration process requires that non-resident defendants whose property is seized be promptly notified thereof (A110) and the sequestration order in this case provided for service by mail on each of the appellants of the order, the summons and the complaint. This procedure here resulted in actual notice and was reasonably calculated to achieve that result. Such a procedure is adequate. *Cf., International Shoe Company v. Washington, supra* at 160. Further, the absence of a state long arm statute does not make the jurisdictional reach of *International Shoe* unavailable.

quantitative. *Hamilton National Bank of Chattanooga v. Russell*, 261 F. Supp. 145 (E.D. Tenn. 1966). Thus,

> "Whether due process is satisfied must depend . . .upon the. . .nature of the activity in relation to the fair and orderly administration of the Laws which it was the purpose of due process clause to insure." *International Shoe, supra,* at 319.

Moreover, strong policy reasons have justified the exercise of jurisdiction even when merely a passing contact was involved. See *e.g., Hess v. Pawloski*, 274 U.S. 352 (1927); *International Shoe, supra* at 159.

Moreover, the provisions of the Delaware Corporate Law relating to benefits of officers, directors, and key employees are perhaps the most advanced provisions of their kind. Patterned on the recommendation of the American Bar Association's Model Business Corporation Act, §145 of the Delaware Corporate Law is virtually verbatim to Section 5 of the Model Act, and offers generous indemnification protection to appellants. Delaware enacted this statute to induce capable and responsible businessmen to accept positions in corporate management. *Merrit-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358 (Del. Sup. 1970). In addition, §143 provides for interest free loans to directors, officers and employees under certain circumstances.

Certainly the foregoing benefits were in the minds of the individual appellants when they accepted the powers, and authorities of officers, directors and employees of a Delaware corporation. Each of the individual appellants has undertaken a corresponding duty to the shareholders to adhere to the standards imposed by Delaware. To require these individuals to respond in and to the State of Delaware is only fair and just and

highly consistent with "traditional notions of fair play and substantial justice." *International Shoe, supra,* 326 U.S. 310.[19]

CONCLUSION

For all the foregoing reasons, appellee contends that in deciding this case the Delaware Supreme Court has followed guidelines recently set by this Court and has, in addition, applied those guidelines with a sense of proportion to balance the particular type of competing interests involved in a case such as this. Therefore, appellee respectfully prays that the decision below be affirmed.

Respectfully submitted,

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19. The cases cited by appellants at p. 27 of their brief are inapposite. They hold that where an officer acts as an agent for the corporation in a state where the corporation is doing business, he is not subject to *in personum* jurisdiction. Here, appellee contends he should be subject to *in personum* jurisdiction in the state of the incorporation, having no regard to whether the corporation is doing business there.